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No. 07-1015

In The Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT JAVAID IQBAL

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Prior to addressing the questions sought to be presented by petitioners, this Court must first determine whether it may exercise jurisdiction. Brief in Opp. 34-35. In particular, the Court must determine whether there is interlocutory appellate jurisdiction to review petitioners' first question presented, which challenges the district court's nonfinal judgment that respondent's complaint sufficiently alleges that petitioners were personally involved in creating what all parties agree was an unconstitutional policy. In addition, this Court must determine whether it has jurisdiction to address the second question sought to be presented by petitioners, which was neither raised nor addressed below, and which is not even implicated by respondent's complaint in this case.

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BRIEF FOR RESPONDENT JAVAID IQBAL

PRELIMINARY STATEMENT

The issues presented by this case have no connection to qualified immunity. Instead, petitioners' first question presented, properly understood, implicates only pleading standards under Fed. R. Civ. P. 8(a) and 9(b)—essentially, whether respondent Javaid Iqbal's complaint adequately alleges petitioners' personal involvement in specific unconstitutional conduct. *See* Br. for Petrs. 30-33. There is no appellate jurisdiction to consider this question because the determination by the district court that respondent's complaint sufficiently alleges petitioners' personal involvement is not a final decision under 28 U.S.C. § 1291. And the exception permitting interlocutory jurisdiction in qualified immunity appeals, *see Mitchell v. Forsyth*, 472 U.S. 511 (1985), does not apply here because petitioners do not seek to review the Second Circuit's determination that they behaved unreasonably in light of clearly established law. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *see also Johnson v. Jones*, 515 U.S. 304, 318 (1995). Nor may this Court exercise jurisdiction over petitioners' second question, which they waived below and which is not even implicated by respondent's allegations against petitioners.

If the Court, however, elects to exercise jurisdiction over the first question presented, the Second Circuit's decision should be affirmed. At the outset, the fundamental premise of petitioners' argument—that the Second Circuit has "vitiated" petitioners' qualified immunity defense by subjecting them to

discovery and liability based on "conclusory" allegations, Br. for Petrs. 29—is groundless hyperbole. The Second Circuit directed that discovery against petitioners shall only take place after all other discovery is complete and then only if discovery from other sources establishes the need to seek information personally from petitioners—it did not hold that respondent's allegations alone were sufficient to obtain discovery from petitioners. *See* Pet. App. 26a-27a, 67a.

Petitioners argue that respondent's complaint should have been dismissed for its supposed failure to sufficiently allege their person involvement in the Government's policy of unlawful discrimination against post-September 11 detainees on the basis of race, religion, and national origin. This argument is refuted by the complaint's clear statement that petitioners "designed," "approved," "condoned," and "agreed" with the policy of classifying detainees for confinement under restrictive conditions based upon their race, religion, and national origin. Pet. App. 168a, 172a-73a (Compl. ¶¶ 69, 96-97).

Petitioners maintain that the rules of pleading mean something different for them than any other litigant because they are "high-ranking" defendants who invoked a qualified immunity defense below and who claim that they were acting to further national security interests. *See* Br. for Petrs. 18-19, 27-29. To accept petitioners' submission requires this Court to ignore several dispositive sources of law. The plain language of the Federal Rules of Civil Procedure does not admit of distinctions based on the identity of defendants, the type of action brought, or the possibility that a qualified immunity defense may be invoked. This Court's longstanding interpretation of these Rules establishes that heightened pleading

standards like the one proposed by petitioners may only be imposed through legislation or by amendment of the Rules. And the affirmative defense of qualified immunity has never been held to alter relevant pleading standards. See, *e.g.*, *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Lower courts can give full force to the qualified immunity defense without the vague, unsupported, and incoherent pleading rule sought by petitioners.

STATEMENT OF FACTS

1. Beginning in January 2002, respondent Javaid Iqbal was held for more than 150 days in a maximum security unit in Brooklyn, New York's Metropolitan Detention Center ("MDC") that was known as the "ADMAX SHU"—short for Administrative Maximum Special Housing Unit. He was held there because he was presumptively categorized as "of high interest" to the September 11th investigations, solely because of his race, religion, and national origin, and for no legitimate reason. Pet. App. 164a-165a, 172a-173a (Compl. ¶¶ 48-53, 96). In the ADMAX SHU, Mr. Iqbal was subjected to solitary confinement, unnecessary and abusive strip searches, and beaten by correction officers, among other abusive conditions. *Id.* 166a, 170a-171a, 176a-177a, 181a-187a (Compl. ¶¶ 60, 63, 84, 87, 89, 113, 116-17, 120, 122, 137-148, 153-54, 158, 168, 171).

After he was released, Mr. Iqbal brought this lawsuit, seeking compensation for the central role that petitioners and other federal officials played in subjecting him to harsh conditions of confinement. Mr. Iqbal brought claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for violations of

his First, Fourth, Fifth, Sixth, and Eighth Amendment rights, as well as various statutory claims, including Federal Tort Claims Act claims against the United States.

2. The complaint alleges that specific defendants crafted, directed, and implemented practices and procedures regarding the confinement of "high interest" detainees in the ADMAX SHU. Among these officers were petitioners, former Attorney General John D. Ashcroft and current Director of the Federal Bureau of Investigation ("FBI") Robert Mueller, who crafted, approved, and directed, "as a matter of policy" that detainees like respondent would be confined in the ADMAX SHU solely because of membership in protected classes. Pet. App. 172a-173a (Compl. ¶ 96-97).

The complaint was filed after the Office of Inspector General of the Department of Justice had investigated and confirmed accounts of abuse of September 11 detainees like Mr. Iqbal. *See* Office of the Inspector General, U.S. Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003), <http://www.usdoj.gov/oig.special/0306/full.pdf> ("*OIG Report*"). And although respondent's complaint does not incorporate the OIG Report in its pleadings, the courts below have looked to the report to place respondent's allegations in context. Pet. App. 116a & n.20. For instance, the OIG Report made the following findings:

- Petitioners Ashcroft and Mueller met with their staff in the weeks after the September 11 attacks to plan the investi-

gation and detention of the detainees. *OIG Report* 12-13.

- From the start, the leads that the FBI investigated were largely based on suspects' protected class status and little else. *Id.* 16 .
- More than 95% of September 11 detainees came from Middle Eastern and South Asian countries. *Id.* 21.
- The "hold until cleared" policy, under which detainees were not released from custody until "cleared" of connection to terrorism, was not reduced to writing, but came from "'at least' the Attorney General." *Id.* 37-38.
- Petitioners attended "continuous meetings" in the first few months after the September 11 attacks at which the "hold until cleared" policy was discussed. *Id.* 39-40.
- September 11 detainees confined in the MDC were held in the ADMAX SHU as a matter of DOJ policy. *Id.* 118. Consistent with the general "hold until cleared" policy created by petitioners, detainees were released from ADMAX SHU only after being "cleared" by the FBI. *Id.* 160.

3. In October 2004, prior to engaging in discovery, several defendants and petitioners filed motions to dismiss respondent's complaint. Among other arguments, petitioners asserted that qualified immunity required dismissal of the complaint. The district court dismissed some of respondent's statutory claims, but permitted each of his *Bivens* claims to

proceed. Pet. App. 71a-150a. The court noted that "the post-September 11 context" supported respondent's assertion of petitioners' personal involvement, and that "some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved." *Id.* 116a-118a. Reasoning that Mr. Iqbal "should not be penalized for failing to assert more facts" given that the extent of defendants' "involvement is peculiarly within their own knowledge," *id.* 118a, the court concluded that the facts alleged in respondent's complaint were sufficient. The district court also found that the OIG Report, which it examined at the invitation of defendants below, suggested that petitioners were personally involved in "creating or implementing" the policies that led to respondent's confinement in the ADMAX SHU. *Id.* 116a n.20. Nonetheless, the district court limited the discovery that could be sought from petitioners to issues directly related to their personal involvement in the alleged unconstitutional conduct. *Id.* 119a. Eight defendants then noticed appeals to the Second Circuit Court of Appeals.

4. A panel of the Second Circuit affirmed the district court's opinion in large part. *Id.* 1a-70a. As to petitioners, the appellate court found that respondent's discrimination-based claims should proceed. *Id.* 58a-63a. The court rejected petitioners' argument that the complaint did not adequately state a discrimination claim because of the following allegations: (1) petitioners' policy targeted respondent and others like him for special detention because of their race, religion and national origin; (2) petitioners adopted the policies and practices challenged in the instant case; (3) the FBI's arrest of thousands of

Arab and South Asian Muslims was under petitioner Mueller's direction; and (4) petitioners knew of, condoned and agreed to subject respondent to harsh conditions of confinement solely because of his membership in protected classes and not for any legitimate reason. *Id.* 62a. The court also held that petitioners were not "necessarily insulate[d]" from liability simply because subordinates classified respondent as "of high interest," because petitioners likely "concerned themselves with the formulation and implementation of policies dealing with the confinement of those . . . designated 'of high interest' in the aftermath of 9/11." *Id.* 59a, 62a.

The Court of Appeals also made several critical legal conclusions. First, the Second Circuit correctly interpreted this Court's decisions in *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) to mean that heightened pleading standards are inappropriate absent authorization from a statute or the Federal Rules. Pet. App. 16a-17a. Second, it interpreted this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), to require a "pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible.*" Pet. App. 24a-25a (emphasis in original). Third, to the extent that a defendant believes that *some* elements of a plaintiff's claim are based on "conclusory" allegations, the Second Circuit pointed to Fed. R. Civ. P. 12(e) as a remedy, consistent with this Court's suggestion in *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Pet. App. 26a. Finally, the court provided explicit directions to the district court to oversee discovery with an eye to-

wards preserving the substance of the qualified immunity defense, precluding discovery against petitioners until all other sources had been exhausted and permitting discovery only if those sources confirmed the need to seek information from petitioners. *Id.* 26a-27a.

SUMMARY OF ARGUMENT

I. No interlocutory jurisdiction exists to review the first question presented by petitioners—whether respondent has sufficiently alleged that petitioners were personally involved in an unconstitutional policy of classifying detainees and approving restrictive conditions of confinement based on their race, religion, and national origin. The district court's determination that the complaint makes sufficient allegations of personal involvement under Rule 8 is not a final decision under 28 U.S.C. § 1291. Petitioners attempt to link their pleading argument to the affirmative defense of qualified immunity, the denial of which on its merits would create a right to an interlocutory appeal. But the distinct issues of qualified immunity which are subject to interlocutory appeal—whether petitioners behaved reasonably in light of "clearly established" law—do not extend to the merits-based question of whether the complaint's allegations are pleaded with sufficient detail. *Mitchell*, 472 U.S. at 528 (holding that an appellate court considering the denial of an immunity claim may not "determine whether the plaintiff's allegations actually state a claim"). Additionally, this Court lacks jurisdiction over the second question presented by petitioners because it was waived below and it is not

germane to the allegations stated in respondent's complaint.

II. Even if this Court has jurisdiction over the first question, petitioners' arguments should be rejected. Petitioners rest on the alleged insufficiency of respondent's complaint to "overcome petitioners' [affirmative] defense of qualified immunity." (Br. for Petrs. 15.) However, petitioners did not seek certiorari on the merits of their qualified immunity defense—whether the relevant law was clearly established or whether petitioners' conduct was objectively reasonable in light of clearly established law. Pet. (I). Accordingly, the heart of petitioners' argument is that the pleading standard imposed by Fed. R. Civ. P. 8 and 9 is different for cases in which the affirmative defense of qualified immunity is invoked by "high-ranking" defendants who acted during a threat to national security.

The text of Rules 8 and 9 makes no distinction based on the existence of an affirmative defense, the status of a defendant, or the presence or absence of national security concerns. The longstanding rule, embodied by the decision below, is that complaints need only meet the standards set forth in Rule 8, unless a statute imposes a higher pleading standard or the subject matter falls into the particularized requirements of Rule 9, neither of which is the case here. *See Leatherman*, 507 U.S. at 168-169; *Swierkiewicz*, 534 U.S. at 514-515. As this Court has emphasized numerous times, "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Hill v. McDonough*, 547 U.S. 573, 582 (2006); *accord Bell Atlantic*, 127 S. Ct. at 1973 n.14.

Petitioners seek to avoid the force of this precedent by describing their proposed pleading rule as a "context-specific" standard and not a heightened pleading standard. At the same time, however, they ask this Court to adopt a new standard requiring more factual specificity for claims brought against petitioners than for claims brought against their co-defendants, solely because of petitioners' "high-ranking" status, even when the subject matter of the claim is the same and even when the same unconstitutional conduct is being challenged. The only reasonable construction of petitioners' rule is that it calls for heightened pleading.

Besides requiring a heightened form of pleading that has no basis in the Federal Rules, there is no support in law or logic for petitioners' proposed rule. Petitioners' argument primarily relies on general statements contained in qualified immunity cases which stand for the noncontroversial propositions that qualified immunity is important, should be resolved as early as possible, and, when valid, protects officials from both trial and the discovery process. None of these principles can bear the weight of petitioners' proposal that a different pleading standard applies when qualified immunity is raised.

Moreover, petitioners ignore the general rule that plaintiffs do not have a duty to anticipate or rebut an affirmative defense. *Jones v. Bock*, 127 S. Ct. 910, 921 (2007); *Gomez*, 446 U.S. at 640. Thus, the invocation of qualified immunity *after* a complaint is filed cannot affect the standard by which the sufficiency of a complaint is judged under Rule 8. In a case heavily relied upon by petitioners, this Court held as much, summarizing its precedents and stating that it has "refused to change the Federal Rules governing

pleading by requiring the plaintiff to anticipate the immunity defense." *Crawford-El*, 523 U.S. at 595.

The Federal Rules, shorn of petitioners' embellishments, also plainly rebut petitioners' contention that respondent need to have pleaded more factual detail to support the allegation that petitioners "intended" to discriminate on the basis of race, national origin, and religion, or that they had "knowledge" of such discrimination. Br. for Petrs. 31-32. Such an argument is foreclosed by Rule 9(b), which specifically provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

This Court instructively rejected a proposal that the Attorney General be shielded by absolute immunity in *Mitchell*, 472 U.S. at 523-24.. If *Mitchell* has any meaning, there will be some, albeit rare, cases in which officials like petitioners may properly be subject to discovery and possibly even trial. Here, the Court of Appeals correctly recognized that this is one such case and that discovery, properly cabined, may be appropriate and necessary to resolving respondent's allegations. Because the lower court's decision is both consistent with this Court's precedents and a sensible way of resolving the important interests at stake in this litigation, the decision below should be affirmed.

ARGUMENT

I. THERE IS NO INTERLOCUTORY JURISDICTION OVER EITHER QUESTION PRESENTED BY PETITIONERS

This Court may not exercise interlocutory jurisdiction over either of the questions sought to be presented by petitioners.

A. THE SECOND QUESTION SOUGHT TO BE PRESENTED BY PETITIONERS WAS NEITHER RAISED NOR DECIDED BELOW, AND IS NOT IMPLICATED BY RESPONDENT'S COMPLAINT

The lack of jurisdiction over the second question presented—whether an allegation that high-ranking defendants had constructive knowledge that subordinates acted unconstitutionally suffices to state a claim for supervisory liability—may be disposed of quickly.

The Second Circuit never addressed any constructive knowledge theory of liability, and despite its cursory reference to a "gross negligence" standard of supervisory liability, Pet. App. 14a, the appeals court did not apply this theory to the claims brought against petitioners. Indeed, respondent has never even *alleged* that petitioners are liable under a gross negligence theory.

Notwithstanding the fact that respondent did not rely on this theory and the Second Circuit did not apply it, petitioners argue that the Second Circuit's precedent would permit liability based on a gross negligence theory. Not only would a ruling by this Court on that claim be purely advisory, but petition-

ers waived the argument in the Court of Appeals by conceding the validity of the very theory they now challenge:

> Agency heads (or former agency heads) therefore cannot be held liable for the wrongs committed by their subordinates in carrying their duties, absent a showing of "direct participation, or failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates."

(Opening Appellate Br. for Petitioners at 34 (*quoting Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996)). There being no live dispute between the parties regarding a constructive knowledge theory of liability and there being no jurisdiction to address it, petitioners' second question will not be discussed further in this brief and should be dismissed.

B. APPELLATE JURISDICTION DOES NOT EXIST TO CONSIDER THE DISTRICT COURT'S NONFINAL DETERMINATION THAT THE COMPLAINT SUFFICIENTLY ALLEGES PERSONAL INVOLVEMENT

A decision denying a motion for summary judgment or a motion to dismiss is not a final decision subject to immediate appeal. 28 U.S.C. § 1291. Thus, jurisdiction over the district court's decision only exists in the limited circumstances established by the collateral order doctrine of *Cohen v. Beneficial*

Industrial Loan Corp., 337 U.S. 541 (1949). And while this Court has approved of the exercise of jurisdiction over the denial of a motion for summary judgment or motion to dismiss based on qualified immunity, *Mitchell*, 472 U.S. at 526, *Behrens*, 516 U.S. at 313, it also has made clear that not every denial of qualified immunity is subject to appeal. *See Johnson*, 515 U.S. at 314.

From the inception of the doctrine, *Mitchell* made clear that what is immediately appealable in a qualified immunity case is the "essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Mitchell*, 472 U.S. at 526. This issue, on which petitioners here did not seek certiorari,[1] is "conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28. Indeed, in prescient language, the *Mitchell* Court emphasized that an appellate court considering the denial of an immunity claim "need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations *actually state a claim*." *Id.* at 528 (emphasis added). Instead, an appellate court need only answer a "question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . . ." *Id.*

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[1] *Amici curiae* supporting petitioners make arguments regarding the Second Circuit's clearly established law holdings, Br. *Amici Curiae* of William P. Barr, et al. at 19-26, but these arguments are not encompassed by the questions presented and may not be considered here. In any event, contrary to *amici*'s insinuation, petitioners have never claimed that any lack of specificity in respondent's complaint made it impossible for petitioners to raise their qualified immunity defense.

The qualified immunity cases that have come before this Court confirm that a qualified immunity appeal based solely on the complaint's failure to state a claim, and not on the ultimate issues relevant to the qualified immunity defense itself, is not a proper subject of interlocutory jurisdiction. Thus, in *Mitchell*, this Court only took up the question of whether it was clearly established in 1970 (the relevant time period for the complaint in *Mitchell*) that "a warrantless wiretap aimed at gathering intelligence regarding a domestic threat to national security" was illegal, 472 U.S. at 530; the sufficiency of the pleadings in that case was never discussed. And in *Behrens*, this Court stated that the *Mitchell* exception for interlocutory appeals of qualified immunity decisions permits appellate courts to decide pure issues of law like "whether the federal right allegedly infringed was 'clearly established.'" *Behrens*, 516 U.S. at 313.

This limitation on interlocutory appeals of qualified immunity follows from the *Cohen* doctrine, which permits review of collateral orders that "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The second *Cohen* factor is the principal one advising against jurisdiction here. *See Mitchell*, 472 U.S. at 529 n.10 (holding that legal issue present in qualified immunity cases is appealable because it "can be decided . . . in isolation from the remaining issues of the case"). It is this separateness requirement that is considered essential to the *Mitchell* Court's reference to appellate courts not "'even determin[ing]

whether the plaintiff's allegations actually state a claim.'" *Johnson*, 515 U.S. at 312 (*quoting Mitchell*, 472 U.S. at 528).

Thus, a district court's order rejecting a qualified immunity defense is not immediately appealable if the order is based on the sufficiency of evidence, because that determination "is not truly 'separable' from the plaintiff's claim." *Johnson*, 515 U.S. at 313 (finding no interlocutory jurisdiction to consider arguments merely because they "happen to arise in a qualified-immunity case"). And when bringing a qualified immunity appeal, the defendant must accept the *plaintiff's* version of the facts as adopted by the district court so that the appellate court can review the district court's determination of the "purely legal issue [of] what law was 'clearly established,'" and need not consider the correctness of the plaintiff's version of the facts. *Johnson*, 515 U.S. at 313.[2] By analogy, determinations of pleading sufficiency are similarly appealable only insofar as they relate to purely legal questions unique to the qualified immunity defense. *Cf. Crawford-El*, 523 U.S. at 589 (distinguishing the evidentiary standard for plaintiff's showing of improper intent, "a pure issue of fact,"

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[2] The Court's decision in *Scott v. Harris*, 127 S. Ct. 1769 (2007), is not to the contrary. First, the *Scott* Court did not explicitly address the jurisdictional question raised here. Second, even if *Scott* can be read as implicitly approving the exercise of jurisdiction over some factual sufficiency determinations in qualified immunity appeals, the Court specifically tied its review of the district court's determination to the existence of material in the record that "quite clearly contradict[ed]" the lower courts' interpretation of the factual material. *Id.* at 1775. In the absence of such contradictory record evidence, this Court recognized that it was bound to accept the determinations made by the district court. *Id.*

from the "separate qualified immunity question whether the official's alleged conduct violated clearly established law, which is an 'essentially legal question'") (quoting *Mitchell*, 472 U.S. at 526-29).

The Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), does not alter this framework. *Saucier* simply confirms that courts considering the qualified immunity inquiry must look at the alleged constitutional violation through two temporal lenses: first whether the allegations in the complaint establish a violation of law *now*, and second whether the same violation was clearly established at the time of the alleged unconstitutional conduct. Here, petitioners concede that if respondent's allegations are proven, they establish a violation of clearly established law; petitioners only complain that the allegations are not sufficient. If *Saucier* had intended to alter the jurisdictional framework of qualified immunity questions such that any determination that a complaint met Rule 8(a)'s standards would be subject to immediate appeal, one would have expected some mention of that in the case. Jurisdiction was not even disputed in *Saucier*, nor was it discussed at oral argument. *See* Brief for Respondent in *Saucier v. Katz*, No. 99-1977, at 1, available at 2001 WL 173527; Tr. of Oral Argument in *Saucier*, available at 2001 WL 300596. Thus, even after *Saucier*, appellate courts considering appeals of qualified immunity questions must accept the district court's resolution of the sufficiency of proof, in summary judgment appeals, or the sufficiency of pleading, in motion to dismiss appeals, but need not defer to the district court's finding that such proof or allegations establish violations of law through *Saucier*'s dual temporal lenses.

C. THE SAME CONSIDERATIONS THAT LIMIT INTERLOCUTORY JURISDICTION IN QUALIFIED IMMUNITY APPEALS PREVENT THE EXERCISE OF APPELLATE JURISDICTION HERE

The reasoning from *Johnson* as to why issues of factual sufficiency are not immediately appealable in a qualified immunity case is fully applicable to the instant case. First, petitioners make no argument regarding the actual qualified immunity issue of the objective reasonableness of their conduct as measured by clearly established law. *Johnson*, 515 U.S. at 313. The Second Circuit rejected petitioners' arguments regarding clearly established law, and their petition for certiorari did not address that holding. Second, the issue of the sufficiency of respondent's allegations against petitioners is inseparable from the merits of the action. *Id.* at 314. And there is no colorable argument that the sufficiency of the pleadings is only put in play by qualified immunity; like the sufficiency of the evidence in *Johnson*, the issue of the sufficiency of the pleadings is present "even in the absence of qualified immunity." *Id.* at 314.

Finally, here the lower courts have indicated that they will revisit the issue of personal involvement after limited discovery that may not even involve depositions of the petitioners. *Id.* at 317 (permitting interlocutory appeal of sufficiency determination "makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision"); Pet. App. 26a-27a. Here, just as in *Johnson*, petitioners ask this Court to take what might be a "small step beyond *Mitchell*" that "would

more than relax the separability requirement – it would in many cases simply abandon it." *Johnson*, 515 U.S. at 315.

Further, the risk that petitioners may have to respond to discovery is insufficient standing alone to justify the exercise of interlocutory jurisdiction. *Id.* at 317-18. The "avoidance of litigation for its own sake" is not enough to trigger an interlocutory appeal. *Will v. Hallock*, 546 U.S. 345, 353-54 (2006). If *Cohen*'s exception applied to every aspect of every decision in which qualified immunity had been raised, "collateral order appeal would be a matter of right whenever . . . a federal officer lost [a motion to dismiss] on a *Bivens* action . . . ." *Id.* The result would mean that the finality required by Section 1291 "would fade out whenever the government or an official lost an early round that could have stopped the fight," imposing a substantial burden on appellate courts. *Id.*

D. PETITIONERS MAY NOT RELY ON A BACKGROUND ALLEGATION OF QUALIFIED IMMUNITY TO BOOTSTRAP JURISDICTION OVER AN OTHERWISE UNAPPEALABLE DECISION

The exercise of interlocutory jurisdiction over qualified immunity appeals cannot be used as a pretense "to lead the court to review . . . underlying," and sometimes "more important," otherwise unappealable issues. *Johnson*, 515 U.S. at 318. And as this Court stated in *Gomez*, it has never "indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action." 446 U.S. at 640. Like any affirmative defense, qualified immunity cannot logically have any effect on the pleading

standard by which a complaint is judged. Thus, circuit courts find no interlocutory jurisdiction to review a denial of a motion to dismiss for failure to state a claim, even when a defense of qualified immunity lurks in the background. *See, e.g., Brown v. Miller*, 519 F.3d 231, 238 (5th Cir. 2008).

Similarly, this Court has rejected the claim that a denial of summary judgment should be immediately appealable by a municipality that claims that a particular official was not a "final policymaker" as is required for *Monell* liability. *Swint v. Chambers County Com'n*, 514 U.S. 35, 42-43 (1995). Like the arguments made here by petitioners regarding their lack of personal involvement, the municipality in *Swint* raised only a "'mere defense to liability.'" *Id.* (*quoting Mitchell*, 472 U.S. at 526). Nor does the Court's exercise of jurisdiction over the question of the elements of a cause of action affect the outcome here, because petitioners are making an argument about nothing more than the "sufficiency of the [pleading]," and not about some essential element of the cause of action against petitioners. *Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006) (addressing retaliatory prosecution claim).[3]

Making the bootstrapping worse, petitioners did not even present to the lower courts the specific argument pressed here—that the relevant pleading standard is mediated by the status of the defendant, the existence of a qualified immunity defense, and the defendants' claim that national security interests informed their policy choices. Instead, as to the suf-

[3] A different jurisdictional question would be presented if petitioners had sought to limit discovery through a mandamus action, *See Cheney v. United States Dist. Ct. for District of Columbia*, 542 U.S. 367 (2004).

ficiency of the personal involvement allegations in the complaint, petitioners only argued that respondent's allegations were "patently absurd," (Opening Appellate Br. for Petitioners at 48) or "untenable and unsupportable," (*id.* at 49). They did not argue that pleading was "context-specific" in any way, and specifically disclaimed any reliance on a heightened pleading standard. (Reply Appellate Br. for Petitioners at 4.) Therefore, the lower courts have not even had the opportunity to pass on the question presented here, making the exercise of jurisdiction improper. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

Relatedly, exercising jurisdiction at this point would also be premature. Consistent with this Court's admonition in *Crawford-El*, the Second Circuit remanded this case to the district court to permit limited discovery regarding the qualified immunity defense raised by petitioners and others. Pet. App. 26a-27a. The lower court quite clearly stated that petitioners would not have to respond to discovery demands until all other avenues had been exhausted and unless respondent could show a basis for believing that discovery from petitioners would be fruitful. *Id.* Petitioners retain the ability to argue that they are entitled to qualified immunity at each progressive stage of discovery, and to appeal such a determination if necessary. Pet. App. 27a. The lower court's ruling thus effectively protects petitioners and their codefendants from the burdensome discovery that justifies interlocutory jurisdiction.

II. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THE FEDERAL RULES, PLEADING STANDARDS, AND QUALIFIED IMMUNITY PRINCIPLES

Even if this Court were to exercise jurisdiction over the first question presented by petitioners, the Second Circuit's decision should be affirmed. Petitioners never explicitly state what rule they would have this Court adopt, but they appear to argue that three factors change the pleading landscape in this case: the presence of (1) "high-ranking" defendants who (2) invoke the affirmative defense of qualified immunity and (3) claim that their conduct was motivated by national security concerns. Br. for Petrs. 16-21, 40-41. Petitioners do not find support for their argument in the text of the Federal Rules, nor do they point to any case in which the pleading standards have been adjusted in the manner and for the reasons proposed here.

Petitioners' arguments instead rest on a misapplication of relevant precedent and a mischaracterization of respondent's complaint, and would require this Court to ignore the Federal Rules of Civil Procedure. Even if these substantial barriers could be put aside, the rule proposed by petitioners is incoherent and would lead to confusion in the lower courts. The Second Circuit's resolution of this case, by contrast, is consistent with this Court's precedents and the Federal Rules, guarantees both consistency and coherence in the lower federal courts, and assures fairness to petitioners.

A. NO HEIGHTENED PLEADING STANDARD APPLIES TO THIS CASE

Prior to the adoption of the Federal Rules of Civil Procedure, pleading was claim specific and required adherence to technicalities that the drafters of the Rules sought to eradicate. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 438-40 (1986). Thus, the goal of the Federal Rules was to create both simplicity and uniformity in pleading, and prevent premature dismissals. *See id.* at 439 ("Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'"); *Swierkiewicz*, 534 U.S. at 513-14. Petitioners' arguments would mark a return to the special forms of pleading that were abolished by the Federal Rules by forcing plaintiffs and courts to consider whether a particular defendant is "high-ranking," whether the defendant will invoke a qualified immunity defense, and whether the subject area of the litigation—like national security—suggests a need for more detailed pleading.

In conformance with the purpose of the Federal Rules, this Court has consistently emphasized Rule 8's liberality while advising against misguided attempts to carve out particular classes of action for heightened pleading requirements. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), this Court rejected a Fifth Circuit rule requiring that Section 1983 complaints against municipal corporations "state with factual detail and particularity the basis for the claim." *Leatherman*, 507 U.S. at 167. Writing for a unanimous Court, Chief Justice Rehnquist declared

this standard "impossible to square … with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168. *Leatherman* explained that lower courts' adoption of heightened pleading standards in service of perceived policy aims misapprehends the proper judicial role in this area, because changes to pleading standards must be accomplished through amendment of the Federal Rules "and not by judicial interpretation." *Id.*

A decade after *Leatherman*, this Court again unanimously struck down a heightened pleading standard, establishing that there is a distinct line between standards of pleading and standards of proof and that no heightened pleading requirement could properly be derived from the requirements for establishing a prima facie case at trial. *See Swierkiewicz*, 534 U.S. at 510. The Court cautioned that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits. *Id.* at 512-13. In this connection it reiterated *Leatherman*'s admonition that a "requirement of greater specificity for particular claims," whatever the "practical merits," may be obtained only "by the process of amending the Federal Rules," not by judicial fiat. *Id.* at 514-15 (quotation marks omitted); *see also Crawford-El*, 523 U.S. at 595 ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").[4]

[4] *Amici* supporting petitioner suggest that, because this is a *Bivens* case rather than a Section 1983 action, this Court has more leeway to impose heightened pleading rules absent Congressional direction. Br. Amici Curiae of William P. Barr, et al.,

1. Petitioners' suggestion that the qualified immunity inquiry is different for claims brought against high-level officials in the national security context cannot be squared with this court's precedents

Petitioners do not point to any part of the Federal Rules or any Congressional action that justifies applying a heightened pleading standard to the claims brought against them in this case. Instead, petition-

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at 29-30. This argument was never raised below, and in any event is rebutted by evidence that Congress is well aware of the significance of *Bivens* claims but has never taken action to adjust the pleading standards for them. Indeed, Congress has acted in other ways to limit access to courts in particular *Bivens* actions. *See* 42 U.S.C. § 1997e(a) (imposing exhaustion requirement on *Bivens* actions involving prison conditions, thus abrogating *Mccarthy v. Madigan*, 503 U.S. 140 (1992).) This Court recognized in *Crawford-El* that Congressional action in passing Section 1997e, which did not make distinctions based upon claims that involve official state of mind, counseled against imposing such a distinction by judicial fiat. 523 U.S. at 597 ("If there is a compelling need to frame new rules of law based on such a distinction, presumably Congress either would have dealt with the problem . . . or will respond to it in future legislation."). Moreover, Congress has considered *and rejected* numerous bills that would protect federal officials from *Bivens* suits by amending the Federal Tort Claims Act to waive the sovereign immunity bar to compensation for constitutional torts. *See* Cornelia T.L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under *Bivens*, 88 Geo. L. J. 65, 98 (1999); William Castro, Government Liability for Constitutional Torts: Proposals to Amend the Federal Tort Claims Act, 49 Tenn. L. Rev. 201, 223 (1982) 201, 223 (1982).

ers begin by adverting to the general precedent that establishes the interests served by the qualified immunity defense. *See* Br. for Petrs. 16-19. Citing to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell*, and their progeny, petitioners correctly identify the interests that are protected by the qualified immunity defense and accurately state that, consistent with these goals, lower courts have been directed to resolve immunity questions at the earliest stage possible, and to protect officials against "broad-ranging" discovery until the immunity question is resolved. *Mitchell*, 472 U.S. at 525-27; *Harlow*, 457 U.S. at 814, 817-18; *see also Behrens* 516 U.S. at 306-08.

Petitioners attempt to leap from these general principles to two specific inferences without support: (1) that the interests at stake in qualified immunity are "at their height" in suits involving national security; and (2) that the protection afforded by qualified immunity is different for "high-ranking" officials than for other Executive Branch officials exercising discretionary responsibilities. Br. for Petrs. 18-19. For the first proposition, petitioners rely solely on an opinion concurring in the judgment in *Mitchell*. That opinion did not argue that the qualified immunity inquiry should be different where national security interests were involved, but instead argued that the Attorney General should have received *absolute* immunity for his conduct. 472 U.S. at 541 (Stevens, J., concurring in the judgment). The majority in *Mitchell*, by contrast, held that the Attorney General is entitled to the same qualified immunity as any other government official, even when he claims that his actions were motivated by national security concerns. 472 U.S. at 520-524. The Court thus rejected the premise at the heart of petitioners' argument

here, explicitly recognizing that the term "national security" "may cover a multitude of sins" and that no "built-in restraints" prevented actions in the name of national security that threaten important constitutional rights. *Id.* at 522-23.

As this Court declared, "the security of the Republic" will not be threatened if petitioners "on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States." *Id.* at 524. The Court observed that this "is as true in matters of national security as in other fields of governmental action." *Id.* Therefore, nothing in *Mitchell* supports the contention that the qualified immunity inquiry is different in cases that involve national security concerns.

Here, petitioners received all of the substantial protections contemplated by the qualified immunity defense and embraced by this Court—they raised it in their motion to dismiss, they were permitted to raise it in an interlocutory appeal, and they have had a stay of discovery against them throughout the proceedings. The Court of Appeals correctly rejected the defense, and instructed the district court to cabin discovery in such a way as to preserve the defense as much as possible in anticipation of a summary judgment motion. Pet. App. 26a-27a. Unable to argue that they were denied the protections of the qualified immunity defense by the courts below, petitioners maintain that allowing any discovery at all to go forward, even after their qualified immunity defense was rejected, undermines the purposes of qualified immunity. Similar arguments have been rejected by this Court. *See Will*, 546 U.S. at 353 ("Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized be-

cause the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was."); *Crawford-El*, 523 U.S. at 593 n.14 ("Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from all discovery.").

As for petitioners' contention that "high-ranking" officials are given more protection under qualified immunity than low level officials in the context of pleading standards, again there is no support even in the cases petitioners themselves cite. For instance, petitioners' quotation of language from *Harlow* for the proposition that "this Court has recognized that 'high officials require greater protection than those with less complex discretionary responsibilities,'" (Petrs.' Br. 18) is misleading. *Harlow*'s language referred to reasoning from *Scheuer v. Rhodes*, 416 U.S. 232 (1974), which clarified that, to account for the broad range of discretion afforded higher level officials, a court resolving a defense of qualified immunity must consider whether a particular defendant acted reasonably in the particular circumstances presented to him. 416 U.S. at 247-48. Although *Harlow* acknowledged this portion of *Scheur*, it followed that acknowledgement by stating that "[n]onetheless, we held that a governor and his aides could receive the requisite protection from qualified or good-faith immunity." 457 U.S. at 807. Neither *Scheur* nor *Harlow* addressed pleading standards, however. At most, *Scheur* simply held that the status of a defendant might affect how much discretion they are afforded, which in turn might influence what conduct could be considered objectively reason-

able in light of clearly established law, an issue not presented by the petition here.

Indeed, this Court has rejected the specific reasoning offered by petitioners quite forcefully, distinguishing between the line-drawing necessary to determine whether particular officials are entitled to absolute immunity and the absence of distinctions made between officials who are entitled to qualified immunity:

> Although we have in narrow circumstances provided officials with an absolute immunity, *see, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide.

Anderson v. Creighton, 483 U.S. 635, 642-643 (1987). Thus, not only is there no support in this Court's precedent for the lines sought to be drawn by petitioners here, but this Court has explicitly rejected drawing such lines.

2. Neither the presence of the affirmative defense of qualified immunity nor of allegations regarding petitioners' state of mind alters the relevant pleading standard

Even if petitioners had correctly distilled a line within qualified immunity jurisprudence that mediated immunity on the basis of the status of a defendant or the subject matter of a lawsuit, nothing suggests that differences in the protection afforded by qualified immunity may be incorporated into the pleading standard used to judge the sufficiency of complaints. *Mitchell* and its progeny do not support, implicitly or explicitly, different pleading standards where qualified immunity and national security intersect.[5] Indeed, petitioners point to no cases in which this Court has adopted such a rule for cases against high level State officials in Section 1983 litigation. *See Butz v. Economou*, 438 U.S. 478, 500 (1978) (finding no reason to accord federal defendants "a higher degree of immunity from liability" in *Bivens* actions than is accorded state actors when sued under Section 1983). Nor is there any support in the Rules for petitioners' broad claim that the presence of a qualified immunity defense for "high-ranking" defendants alters the pleading standard in

[5] Nor do the Federal Rules state that the specificity necessary to state a claim depends on the *kind* of claim brought. 5 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1221 (3d ed. 2004) ("The same pleading philosophy discussed in the preceding sections controls in every case, regardless of its size, complexity, or the number of parties that may be involved.").

this case, even where petitioners claim that national security interests are implicated.

Aside from drawing a line based on status and subject area of litigation, petitioners also seek to draw from general qualified immunity cases the rule that there is a heightened pleading standard for cases against high level officials in which an officer's state of mind is at issue. Br. for Petrs. 20-21. There are several bars to this inferential leap. As an initial matter, petitioners make no effort to show how an "unduly permissive" pleading standard as to state of mind allegations, *id.* 19, could result in a defendant being improperly denied qualified immunity. If petitioners were correct, interlocutory jurisdiction would be proper any time a district court failed to grant a motion to dismiss by a government official, whether based on qualified immunity or any other argument. After all, if the harm of erroneously proceeding to discovery is the evil to be prevented by qualified immunity, then any decision that permits discovery should be subject to immediate appeal. This Court has never permitted such a rule. *Will*, 546 U.S. at 353-54.

Petitioners have mistaken one of the reasons for permitting the early resolution of the qualified immunity defense—protecting against "broad ranging" discovery, *Harlow*, 457 U.S. at 817-18—with an inexorable command that whenever discovery against government officials is contemplated, the purposes of qualified immunity are undermined. Where a qualified immunity defense is correctly rejected, however, allowing discovery against government officials does not undermine the purposes of the defense. In this sense, the evil to be prevented is not any discovery at

all, but discovery when a government official has a valid qualified immunity defense.

In addition to being unsupported by precedent, petitioners' proposed rule is contrary to the Rules and to this Court's consistent interpretation of them. The Rules themselves specifically contemplate that while allegations of fraud must be pleaded with "particularity," "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Rule 9(b) was incorporated in the original Rules and has never been amended. The Advisory Committee Notes to Rule 9 indicate that Rule 9(b) was adopted to be consistent with English rules of practice. *See* Fed. R. Civ. P. 9, Advisory Committee Notes to 1937 Adoption (citing *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22.) The English rules cited by Rule 9 state quite explicitly that when a plaintiff makes allegations as to any "condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred." Jeff Sovern, Reconsidering Federal Civil Rule 9(B): Do We Need Particularized Pleading Requirements in Fraud Cases? 104 F.R.D. 143, 146 n.19 (1985). There is good reason for this Rule. Requiring specificity in pleading states of mind

> would be unworkable because of the difficulty inherent in describing a state of mind with any degree of exactitude and because of the complexity and prolixity that any attempt to support these averments by setting forth all the evidence on which they are based would introduce

> into the pleadings. Moreover, a rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general "short and plain statement of the claim" mandate in Rule 8(a) and the liberal spirit the federal courts have accorded to applying it should control the second sentence of Rule 9(b).

5 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1301 (3d ed. 2004).

If Rule 9(b) means anything, it must be that allegations regarding state of mind can be alleged without reference to specific facts. After all, if allegations of fraud must be pleaded with "particularity," that must mean that allegations related to knowledge, intent, or motive, need not be pleaded with particularity. Thus, this Court has only required that specific facts are necessary to establish scienter where there has been explicit Congressional authorization to do so. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007).

Congress has taken this opportunity to require detailed fact pleading for particular categories of claims that have a state of mind element. *See, e.g.*, 15 U.S.C. § 78 u-4(b)(2) (requiring, in securities fraud class actions, that plaintiffs "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"). Here, by contrast, Congress has taken no steps to exempt *Bivens* actions from the command of Rule 8(a). Thus, "firm application" of the Federal Rules, as petitioners

propose, Br. for Petrs. 16, cannot support their proposed heightened pleading standard for claims implicating the state of mind of "high-ranking" government officials who assert that they acted to vindicate national security interests.

B. NONE OF THE CASES RELIED UPON BY PETITIONERS SUPPORTS APPLICATION OF THEIR NOVEL PLEADING STANDARD

When one steps back from general qualified immunity jurisprudence, petitioners are left with three sources of authority for their claim that this Court should disregard respondent's allegations that petitioners "knew of," "condoned," "approved of" and/or "designed" (Pet. App. 172a-173a, 190a) an unconstitutional policy: *dicta* in *Crawford-El*, 523 U.S. at 597-98; the adoption of an objective standard for qualified immunity in *Harlow*, 457 U.S. at 815-18; and the Court's application of traditional pleading standards in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). None of these sources, however, supports petitioners' argument.

Crawford-El does not even address relevant pleading standards, or the relationship between pleading standards and qualified immunity. Rather, the Court considered and forcefully rejected a heightened *burden of proof* that lower courts had imposed on civil rights plaintiffs in cases where the motive of the defendant was an element of the cause of action, leaving the imposition of any such heightened standard to the rule-making and legislative processes. 523 U.S. at 592-594. To the extent that a defendant believes that there is insufficient factual pleading in a complaint, the *Crawford-El* Court stated in *dicta*:

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may . . . grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.

Id. at 597-598 (internal quotation marks omitted).

Petitioners misleadingly quote from only the last sentence of this paragraph, Br. for Petrs. 21, so as to sever *Crawford-El*'s dicta from its Rule 12(e) context. And even if petitioners' reading of the language used in *Crawford-El* were correct, it could not be squared with this Court's later decision in *Swierkiewicz*, which unlike *Crawford-El* was decided at the pleading stage. 534 U.S. at 514-15. If anything, however, *Crawford-El* confirms that the Federal Rules already take account of the concerns expressed here by petitioners, and that an adjustment of pleading standards is unnecessary. Notably, petitioners have for-

gone numerous opportunities to seek a more definite statement pursuant to Rule 12(e). Pet. App. 26a. Petitioners thus have declined to take advantage of the protective mechanisms suggested by *Crawford-El*'s dicta.

Petitioners' reference to this Court's adoption of an objective standard for qualified immunity also does not advance their argument. When this Court abandoned the "good faith" immunity standard of *Wood v. Strickland*, 420 U.S. 308 (1975), it did so because of concerns that the good faith immunity standard could be easily evaded through artful pleading. *Harlow*, 457 U.S. at 817-19. That the Court responded to this concern by adjusting its qualified immunity standard, *rather than* the liberal pleading standard, only confirms the general rule that pleading rules are governed by the Federal Rules and not by the Court's assessment of various policy concerns. Here, the concerns that motivated the Court to adopt an objective standard have been fully incorporated by the Second Circuit's decision. Pet. App. 13a-14a, 29a, 59a. Petitioners' conduct, as alleged in the complaint, was judged by its objective conformity with clearly established law. *Id.* That petitioners nonetheless may have to respond to limited discovery requests does not eviscerate their entitlement to assert qualified immunity. *Id.* 27a.

This leaves petitioners' reliance on *Bell Atlantic*, but that case did not alter these fundamental rules. *Bell Atlantic* reaffirmed *Swierkiewicz a*nd with it the rejection of any heightened pleading standards imposed by judicial fiat. *Bell Atlantic*, 127 S. Ct. at 1973-1974 & n.14. Rather than require detailed fact pleading, the Court simply held that the facts alleged, taken as true, have to plausibly suggest the

right to relief. *Id.* at 1964, 1973 n.14. *Bell Atlantic*'s "plausibility" requirement has particular force where a complaint alleges facts that are consistent with both legal and illegal conduct. *Id.* at 1972-1973. The case does not suggest, however, that the facts necessary to state a claim are to be adjusted based on the status of a defendant, the fact that a plaintiff is bringing a constitutional tort claim, or to take account of an affirmative defense.

The *Bell Atlantic* Court contrasted its description of Rule 8's pleading standard with what it admitted was one extreme reading of language from *Conley v. Gibson*, 355 U.S. 41 (1957), which suggested that a complaint could not be dismissed if a court could imagine any set of facts, whether alleged in the complaint or not, that could support the claims for relief. *Id.* at 1968-1969. Instead of leaving such matters to a court's imagination, *Bell Atlantic* held that claims must be supported by facts alleged in the complaint, even if they may be proven by other facts developed through discovery. *Id.* at 1969. Thus, *Bell Atlantic* disclaimed any intention to radically alter the Rule 8 pleading standard; rather, it announced the retirement of a phrase from *Conley* that few lower courts had taken literally and that was "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Id.*

Bell Atlantic's holding must also be understood in light of the antitrust conspiracy claim it addressed, in which the Court confronted a particular factual dilemma in resolving a motion to dismiss antitrust conspiracy claims: the impossibility of distinguishing lawful parallel conduct from unlawful conspiratorial conduct, absent the allegation of *some* fact that indicates conspiracy. *Id.* at 1964. The allegations in *Bell*

Atlantic were deemed implausible not because the Court suspected that they were not true, but because the complaint on its face made clear that the inference of conspiracy was drawn entirely from lawful parallel conduct, an inference that is not permitted under substantive antitrust law. Thus, *Bell Atlantic* did nothing to disturb the well-settled rule that a complaint must survive a motion to dismiss so long as the factual allegations, taken as true, are not "a formulaic recitation of the elements of a cause of action" and "raise a right to relief above the speculative level." *Id.* at 1965. Moreover, a court may not look behind factual allegations and decide whether "actual proof of those facts is improbable." *Id.*

Unlike *Bell Atlantic*, it cannot be argued here that the allegations against petitioners are consistent in any way with lawful conduct. Indeed petitioners concede that an allegation the petitioners knew and acquiesced in discriminatory conduct, or directed the conduct themselves, would state a claim that the constitution was violated. Br. for Petrs. 44-45. Their only quarrel with the decisions below is its holding that the complaint adequately connected petitioners to these allegations. In this context, *Bell Atlantic* adds little to the picture.

Nor is there the prospect here, as in *Bell Atlantic*, that the burdens of discovery will overwhelm petitioners. The United States, which continues as a defendant under respondent's FTCA claims, has produced the bulk of documents to date, the most burdensome aspect of discovery in this case. The only realistic burden for petitioners is the possibility of a deposition, but under the Second Circuit's decision even that will only take place if preliminary discov-

ery provides respondent with grounds to seek such a deposition. Pet. App. 26a-27a.

This is simply not the case where the defendants will be pressured into settling an meritless case because of the burdens of discovery. If such pressure were thought to exist, they would likely have emerged before participation by the Government in numerous depositions and extensive document production. The Government's settlement for $300,000 of one claim raising essentially the same allegations as respondent refutes the disingenuous suggestion by petitioners and their amici that the claims advanced here are "insubstantial." Br. for Petrs. 20; Br. *Amici Curiae* of William P. Barr, et al., at 12. Similarly, petitioners' and their *amici*'s protests that the Second Circuit's decision will result in a rush to sue high-ranking officials falls flat when one considers that the only support offered for this proposition is a hearsay recounting of the experience of Attorney General Levi. Br. for Petrs. 41. Notably, even that account does not suggest that General Levi ever was subjected to discovery, even under pre-*Bell Atlantic* pleading standards, and no reported case indicates that he was ever burdened by discovery. *See, e.g. Burrascano v. Levi*, 452 F. Supp. 1066 (D. Md. 1978).

Petitioners suggest that the Court should inquire whether it is likely that respondent will be able to show that petitioners intended to discriminate. Br. for Petrs. 34-35. But in the absence of a specific heightened pleading requirement, "ordinary pleading rules are not meant to impose a great burden." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The Rule 8 standard is satisfied if a complaint gives "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

Swierkiewicz, 534 U.S. at 512 (internal quotation marks omitted). "Fair notice" is that which will enable the defendant to answer and prepare for trial. 5 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1215 (3d ed. 2004). In a garden variety negligence action, for example, it is sufficient to state that on a given date and a given place, "defendant negligently drove a motor vehicle against plaintiff." Fed. R. Civ. P. Form 9 (cited with approval by *Bell Atlantic*, 127 S. Ct. at 1970 n.10). In the more closely analogous Title VII context, it is sufficient to allege that an adverse employment action was taken "on account of" prohibited factors. *Swierkiewicz*, 534 U.S. at 514. Thus, under Rule 8, a complaint need not identify the exact nature or mechanism of the defendant's misfeasance to state a claim. And, critically, to the extent a complaint alleges a defendant's state of mind, such as knowledge or intent, it may be averred "generally," without any subsidiary facts. Fed. R. Civ. P. 9(b).

That *Bell Atlantic* worked no significant change to Rule 8 pleading standards is evidenced by the Court's per curiam disposition of a Section 1983 complaint in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). In *Erickson*, the lower court had dismissed a prisoner's claim of deliberate indifference to serious medical needs because the prisoner had failed to allege that he suffered any particular harm as a result of a denial of medical treatment. *Id.* at 2199. The Court reversed this disposition, finding that an allegation that the denial of care was endangering the prisoner's life was sufficient, without more, to state a claim. *Id.* at 2200. In so doing, the Court reemphasized that such a contention, albeit lacking specifics, was not "too conclusory" to provide fair notice of the

substance of the claim, that "[s]pecific facts are not necessary," and that all factual allegations in the complaint must be taken as true at the motion to dismiss stage. *Id.* (citing *Bell Atlantic* and *Swierkiewicz*). Although a qualified immunity defense was available to the defendant in *Erickson*, the Court did not apply a different pleading standard in evaluating the complaint.

Erickson also confirms that *Bell Atlantic* did not alter *Swierkiewicz*'s essential holding that the requirements of notice pleading are minimal. Reviewing a pleading alleging discriminatory conduct, *Swierkiewicz* held that it is sufficient to allege that a plaintiff suffered an adverse employment consequence (the "what"), the events leading to that adverse consequence (the "when"), the identities and protected-class status of some of the individuals involved (the "who"), and that the defendant took the adverse employment action "on account of" a plaintiff's protected class status. 534 U.S. at 514. The Court found these allegations sufficient, even though it acknowledged that its holding could result in some complaints with "conclusory" allegations advancing to discovery. *Id.*

With this understanding of *Swierkiewicz* in mind, the complaint in the instant case easily alleges the what, when, who, and where elements: (1) the "what" for these petitioners is the policy of categorizing detainees as "of interest" and "of high interest" based solely on their protected class status; (2) the "when" is the period that respondent was subjected to discriminatory classification and treatment; (3) the "who" are each of those individuals involved in different ways in respondent's confinement in the ADMAX SHU; (4) and the "where" is both Washington,

D.C. and New York City. Pet. App. 164a, 168a, 169a, 172a, 173a (Compl. ¶¶ 48, 49, 69, 81, 96, 97.). As such, the complaint meets the standards set forth in *Swierkiewicz*, and by extension, *Bell Atlantic*.

Petitioners would fault respondent for not having access at the time of filing to additional information establishing petitioners' liability, but the motion to dismiss standard does not require such particularity. *Bell Atlantic*, 127 S. Ct. at 1964 (not requiring "detailed factual allegations"). Insisting on such specificity here is particularly disingenuous, because petitioners and their codefendants found the complaint specific enough to lay blame for the conduct alleged therein at the feet of other defendants. For instance, petitioner Ashcroft argued in the district court that lower level MDC officials were not responsible for the placement of respondent in restrictive conditions of confinement because that decision "was driven by national security and foreign threat concerns which wardens and prison officials were in no position to second guess." (Ashcroft District Ct. Br. at. 13 (*cited* at App. 118a)). Petitioner Ashcroft would apparently now argue that, not only were such decisions not made at the lowest levels of the MDC, they also were not made at the highest levels of the Department of Justice, placing responsibility squarely on his codefendants Rolince and Maxwell. Br. for Petrs. 32-33. Petitioners' ability to assign blame undermines any argument that they do not "know what to answer" in responding to respondent's complaint, the ultimate purpose of the notice required by the Federal Rules and reaffirmed by *Bell Atlantic*. 127 S. Ct. at 1270 n.10. In *Bell Atlantic*, by contrast, the plaintiffs alleged a conspiracy that formed over several years and that involved several large corporations – in that

context, the Court noted that a defendant seeking to answer the complaint "would have little idea where to begin." *Id.*

At the same time, petitioners' codefendants have pointed fingers at each other in disclaiming responsibility for the discriminatory policies challenged here. (*See* Rolince Appellate Br. 24-25, 29-30; Sawyer Appellate Br. 27-28; Hasty Appellate Br. 42-44.). Yet petitioners—who have far more control over respondent's access to information than do most defendants—expect respondent to discern, prior to discovery, the precise roles and responsibilities exercised by each defendant when they themselves have substantial disagreements.

Indeed, the Court's consistent refusal to alter the liberal pleading requirements of Rule 8 as petitioners now request is particularly salient here, where there is such a profound informational asymmetry. Of the thousands of documents produced in this litigation to date by the Government, every one has been classified confidential, subject to a protective order, and would presumably have been unavailable to Mr. Iqbal prior to filing his complaint. Moreover, there is evidence that policies related to the one challenged in this case were never reduced to writing, and therefore the only means of discovering them is through interrogatories or depositions. *OIG Report* at 37-38 (stating that "hold until cleared" policy did not exist in writing, even though it originated from petitioner Ashcroft). At the same time, in the lower courts, defense counsel have suggested that petitioner Ashcroft authored a memorandum to subordinates such as Michael Rolince, also a defendant in the instant case, outlining how the classification system at issue in this litigation was to be carried out. (*See* Tr. Of

4/28/08 Status Conference at 19, Docket No. 539). Without the discovery process, respondent would have no ability to lawfully obtain any of this information. It is presumably for this reason that this Court recognized in *Crawford-El* the well-established principle that discovery is the proper means for plaintiffs to amplify allegations in a complaint. 523 U.S. at 599-600. The teachings of *Bell Atlantic*, *Swierkiewicz*, and *Crawford-El* therefore confirm rather than conflict with the Second Circuit's decision in this case.

Even if petitioners could overcome the substantial barriers posed by precedent and the Federal Rules, their proposed new rule is fundamentally ill-advised. The uncertainty inherent in this proposed rule is most evident in the possible interpretations of "high-ranking" official. For instance, although petitioners claim that their proposed rule fairly distinguishes between their own status and the status of their co-defendants, their codefendants themselves seek to take advantage of the rule in this very proceeding. *Compare* Br. for Petrs. 33 n.4 *with* Br. for Respondents Rolince and Maxwell 5 *and* Br. for Respondent Hasty 10-11.

Moreover, petitioners' justification for a defendant-specific heightened pleading standard rests in part on the fact that they oversee large federal agencies and have many responsibilities. Br. for Petrs. 27-28, 36-37. Presumably, similar arguments could be made on behalf of officials who oversee large federal agencies, or wardens who oversee large prisons, as opposed to those who supervise small agencies or prisons. If the Court were to adopt petitioners' rule, lower courts and litigants would have little guidance

as to how to assess pleadings involving such individuals for compliance with Rule 8.

C. THE SECOND CIRCUIT PROPERLY FOUND THAT RESPONDENT'S COMPLAINT ADEQUATELY ALLEGES PETITIONERS' PERSONAL INVOLVEMENT

Respondent's complaint easily satisfies the well-settled rules governing pleading that have been enunciated by this Court. The complaint gives sufficient notice to petitioners as to the nature of respondent's claims, and each of the allegations made against petitioners can be admitted or denied without the pleading of any additional subsidiary facts.[6] Moreover, the complaint establishes an entitlement to relief against petitioners based on two independent theories of supervisory liability: (1) petitioners' creation of a discriminatory policy of classifying detainees based on their race, religion, and national origin; and (2) petitioners' knowledge and acquiescence in their subordinates' use of discriminatory cri-

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[6] Respondents Hasty, Rolince, and Maxwell have each argued that the complaint also fails to sufficiently allege their involvement in the unlawful conditions of confinement imposed upon respondent. Br. for Respondent Hasty 20-21; Br. for Respondents Rolince and Maxwell 9-10. None of these arguments is cognizable here, as the questions presented are limited to whether the lower courts properly determined that respondent had adequately alleged claims against *petitioners*. Respondents Rolince and Maxwell have not even petitioned for certiorari in this Court, and while Sup. Ct. Rule 12.6 permits them and respondent Hasty to file briefs in support of petitioners, no Rule permits respondents to expand the questions presented to the Court so as to encompass the sufficiency of the allegations made against each respondent individually.

teria to make classification decisions among detainees. Importantly, the first question presented, and petitioners' arguments directed thereto, only relate to the second theory of liability. Thus, even if the Court agrees with petitioners that the complaint does not state a cause of action as to the second theory of liability, the Second Circuit's holding that respondent states a claim as to the first will survive.

To understand how the complaint adequately alleges *Bivens* claims against petitioners, it is important to note the many areas of agreement among the parties as to the substantive law governing supervisory *Bivens* liability. First, it is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*. Second, and relatedly, all agree that a supervisor must take some affirmative act (or legally actionable omission) that contributes to or causes the constitutional violation alleged by a plaintiff. Pet. App. 14a. Third, petitioners agree that a supervisor's knowing acquiescence to subordinates' unconstitutional conduct is enough to establish supervisory liability. Br. for Petrs. 44-45; Pet. 29-31. Finally, if a supervisor takes affirmative steps to create a facially unconstitutional policy, to be applied by subordinates, this too will establish supervisory liability. *Cf. Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992).

With these principles in mind, under the longstanding pleading rules described above, the complaint in the instant case adequately alleges petitioners' personal involvement in the unconstitutional conduct that is the subject of the complaint. Petitioners attempt to micharacterize the decision below and the complaint in several ways: (1) by arguing that respondent alleged only that petitioners estab-

lished a general policy of holding "high interest" detainees in restrictive conditions of confinement, but not that petitioners established a policy to discriminate on the basis of race, religion, and national origin, Br, for Petrs. 30; (2) by implying that petitioners can only be held liable if they were personally involved in the specific decision to classify respondent as of "high interest," Br. for Petrs. 31, 37; and (3) by characterizing respondent's allegations as to petitioners' knowledge and intent to discriminate as "conclusory." Br. for Petrs. 32. Each of these contentions is inconsistent with the plain language of the complaint, read in light of the pleading rules discussed above:

- Petitioner Ashcroft was the "principal architect" of the policies challenged in this lawsuit. Pet. App. 157a (Compl. ¶ 10).
- Petitioner Mueller was "instrumental in the adoption, promulgation, and implementation" of the challenged policies. *Id.* (Compl. ¶ 11).
- From its inception, the September 11 investigation targeted men based on their race, religion, and national origin. *Id.* 164a (Compl. ¶ 47).[7]

[7] This was consistent with other Government policies after September 11 which targeted Arab, South Asian, and Muslim individuals for categorical suspicion. *See* Asian American Legal Defense and Education Fund Report, *Special Registration: Discrimination and Xenophobia as Government Policy*, January 2004, available at <http://www.aaldef.org/images/01-04_registration.pdf>.

- Respondent and others were classified as "of high interest" to the September 11th investigation solely "because of [their] race, religion, and national origin . . . and not because of any evidence of [their] involvement" in terrorism. *Id.* (Compl. ¶¶ 48, 49).
- Petitioners "approved" the policy of holding "high interest" detainees in highly restrictive conditions of confinement until "cleared" by the FBI. *Id.* 168a (Compl. ¶ 69).
- Petitioners "knew," "condoned," and "agreed" that respondent and others like him be subjected to these harsher conditions of confinement "as a matter of policy, solely on account of their religion, race, and/or national origin." *Id.* 172a (Compl. ¶ 96).
- Petitioners "willfully . . . designed" a policy of confining individuals like respondent in the ADMAX SHU for these arbitrary reasons. *Id.* 173a (Compl. ¶ 97).
- Petitioners "adopt[ed]," "promulgat[ed]," and "implement[ed]" a policy and practice of imposing harsher conditions of confinement on respondent and others because of respondent's religious beliefs, *id.* 201a, 206a (Compl. ¶¶ 232, 247), race, *id.* 202a, 208a (Compl. ¶¶ 235, 250), and national origin, *id.* 208a (Compl. ¶ 250).

The cited language shows that respondent alleged that petitioners were personally responsible for the discriminatory policy of classifying Arab and Muslim detainees as "high interest" solely because of their race, religion, and national origin—the complaint alleges that "high interest" detainees were classified as such for discriminatory reasons, that "high interest" detainees were confined in the ADMAX SHU, and that petitioners approved of respondent and others like him being confined in the ADMAX SHU because of his race, religion, and national origin. The Second Circuit correctly held that these allegations establish respondent's claim that he was kept in harsh conditions of confinement solely because of discrimination and that petitioners, among others, targeted respondent for mistreatment because of his race, religion and national origin. Pet. App. 59a. Additionally, the Second Circuit properly interpreted these allegations as stating that respondent specifically alleged that petitioners both condoned and agreed to this discrimination, and that no further subsidiary facts need be alleged. Pet. App. 62a.

Thus, respondent has not alleged that petitioners personally classified Mr. Iqbal, but instead that Mr. Iqbal's classification was a result of petitioners' categorical policy of discrimination on the basis of race, religion, and national origin. If any further confirmation were needed, one need look no further than the arguments petitioners themselves made below. In their brief before the Court of Appeals, petitioners acknowledged the complaint's allegation that petitioners "adopted and implemented a 'policy and practice of imposing harsher conditions of confinement' on plaintiffs because of their religious beliefs or race," and adopted the policy of holding detainees in

the ADMAX SHU until they were "cleared" by the FBI because of discriminatory animus. (Opening Appellate Br. for Petitioners at 47-48).

Petitioners argued below that these allegations should be rejected, not because the complaint only alleged petitioners' *knowledge* of misconduct (as petitioners argue for the first time here), but for two different reasons: (1) that the allegations as to discriminatory animus were "patently absurd"; and (2) that one should expect that those suspected of involvement in September 11 would share the "religious and national origin background" of the attackers. *Id.* Petitioners' first argument requires the assumption that individuals in high positions of authority never discriminate, an assumption that is inappropriate at this stage of the proceedings and belied by the facts alleged in the complaint. Petitioners' second argument, which they repeat here, Br. for Petrs. 34-35, is a remarkable concession to unlawful discrimination. And in any event, it is essentially an argument that their discriminatory policy was justified under the circumstances, a premature argument that is most appropriately introduced at the summary judgment stage to establish that a compelling state interest justified discrimination. *Johnson v. California*, 543 U.S. 499 (2005) (placing burden on prison to establish necessity for racial classification).[8]

All that remains is petitioners' argument that the complaint's allegation of knowledge of and agree-

[8] Thus, petitioners' reference to the scale of the September 11 investigation is improper. Br. for Petrs. 36-37. Those facts are not contained in respondent's complaint, and at best are relevant at a later stage in the proceedings, when petitioners seek to establish that their policy was justified or objectively reasonable.

ment to create the discriminatory policy is a "conclusory" allegation that the Court is not bound to accept as true at the motion to dismiss stage. Br. for Petrs. 32. The difficulty with this contention is that Rule 9(b) specifically allows states of mind to be averred generally. The complaint alleges that petitioners agreed to subject respondent and other like him to particular conditions of confinement in the ADMAX SHU solely because of their religion, race and national origin and not for any legitimate reason. Pet. App. 172a (Compl. ¶ 96). The complaint further alleges that petitioners implemented a policy and practice of imposing harsher conditions of confinement on respondent and others because of their religion and race. Pet. App. 201a-202a (Compl. ¶¶ 232, 235). These are facts under Rules 8 and 9(b)—not legal conclusions—that establish respondent's claim of unlawful discrimination. Unlike the allegation of conspiracy in *Bell Atlantic*, petitioners here can answer each of these allegations quite precisely—they either did or did not know of the discriminatory policy, and they either did or did not agree with the policy. This is far from a conclusory statement such as "Defendants violated plaintiff's Fifth Amendment rights" which, like the allegations in *Bell Atlantic*, would leave a defendant with nowhere to begin in preparing an answer. 127 S. Ct. at 1270 n.10.

Petitioners also attempt to limit the reach of respondent's complaint by claiming that the complaint only seeks to establish liability against them based on the "alleged illegal conduct of a lower-level officer." Br. for Petrs. 28-29. This conveniently ignores those aspects of respondent's complaint which allege that petitioners themselves behaved unconstitutionally by designing the policy of treating detainees dif-

ferently based on their race, religion, and national origin. Pet. App. 172a-173a. Such allegations do not rely on the alleged illegal acts of subordinates, except to the extent that respondent needs to establish that he was treated discriminatorily in order to establish damages. Indeed, under the Equal Protection Clause, the discriminatory classification itself, with the possibility that it would lead to harmful consequences, is sufficient to establish a cognizable injury, as this Court held in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, 2750-51 (2007). Nor can the Court accept petitioners' suggestion that, simply because lower level employees had responsibility for carrying out their unconstitutional policy, petitioners are immune from liability for creating the policy. Petitioners might be arguing instead that respondent is barred by *Bell Atlantic*'s "plausibility" analysis from pleading claims in the alternative. But *Bell Atlantic* cannot reach so far as to displace Rule 8(d)'s contemplation that claims may be pleaded in the alternative, even if inconsistent with each other.[9]

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[9] Petitioners highlight respondent's allegation that "[i]n many cases," the "high interest" designation was based on race, religion, and national origin, as if this undermines the discriminatory nature of the classification. (Petrs.' Br. 30.) But a plaintiff alleging discrimination need not establish that *every* decision made by a defendant reflected discriminatory animus in order to establish that discrimination pervaded the relevant acts challenged by the plaintiff. The allegation that the discriminatory classification occurred in many cases simply reflects that, on some occasions, classifications were made by lower level employees which reflected an actual belief that there was a connection between a detainee and terrorism. This only happened, however, in those cases when there was no need to rely on the blanket policy that Muslims, Arabs, and South Asians were presumptively suspicious. Respondent's complaint

Nor is anything established by petitioners' recognition that both the "of interest" and the "of high interest" designation were pervaded by discrimination. As the OIG Report demonstrated, and as alleged in the complaint, there was no relevant difference between the groups categorized as "of interest" and "of high interest." *See OIG Report* at 70. Both groups were selected because of discriminatory policies, and it is no answer for petitioners to say that the discrimination in selecting "of interest" detainees immunizes the discrimination inherent in the "of high interest" classification. At best, petitioners might argue that it was the "of interest" classification which was discriminatory, and the "of high interest" classification which was random and arbitrary. But even if that were true, the initial classification as "of interest," stemming as it did from an unconstitutional policy created by petitioners, is nonetheless actionable. This Court's decision in *Parents Involved* clarifies that, where a discriminatory classification creates even the "possibility" that the individual so classified will be treated differently, Equal Protection concerns are triggered. 127 S. Ct. at 2750-51; *see also id.* at 2796-97 (Kennedy, J., concurring in part and concurring in the judgment).[10]

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makes clear that he was classified as of "high interest" because of his protected class status and not any legitimate reason. Pet. App. 164a (Compl. ¶49).

[10] Petitioners' contention that investigators were right to focus on "individuals . . . who bore characteristics similar to the September 11 highjackers," (Petrs.' Br. 31) merits a brief response. Putting aside whether it is permissible for investigators to rely solely on protected characteristics in *conducting an investigation* such as this, the question here is whether it is permissible to presumptively suspect such individuals of involvement in terrorism, and thereby *subject them to restrictive condi-*

Petitioners imply that the Court of Appeals disregarded *Bell Atlantic* by relying on the discovery process to weed out "a claim just shy of a plausible entitlement to relief." (Petrs.' Br. 26.) The Court of Appeals never stated that it was relying on the discovery process to buttress respondent's otherwise insufficient allegations against petitioners. To the contrary, the Court of Appeals correctly found that the allegations stated a plausible claim for relief, Pet. App. 62a, and cabined discovery so as to preserve as much as possible petitioners' entitlement to qualified immunity, *id.* 26a-27a. This approach is fully consistent with the Court's precedents. Indeed, given the daily involvement of petitioners in matters concerning the investigation and detention of September 11th detainees, *OIG Report* at 39-40, it is virtually inconceivable that petitioners were not involved in the wide-ranging and politically significant decision that detainees of a particular race, religion, and national origin were automatically considered "of high interest" to the September 11th investigation.

Petitioners also attempt to draw an unsupported link between the need to assess qualified immunity claims in light of the "specific context of the case," *Saucier*, 533 U.S. at 201, and the interpretation of some lower courts that *Bell Atlantic* calls for a context specific application of pleading standards. Br. for Petrs. 27. Of course, when *Saucier* referred to the "specific context" of a case, it was referring to determining the appropriate level of generality at which to judge "clearly established" law. 533 U.S. at 201.

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tions of confinement, absent any indication *other* than their protected characteristics. An allegation that these classifications were made for no legitimate purpose states an Equal Protection claim. *See, e.g.*, *Johnson*, 543 U.S. at 505-08.

And the only Court of Appeals decision cited by petitioners in support of their contention that the context of this particular case should influence the interpretation of the complaint, *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008), only highlights the sufficiency of the pleadings contained in respondent's complaint. In *Robbins*, the complaint failed to identify which acts were attributable to which defendants, 519 F.3d at 1250, unlike in this case. Moreover, the facts alleged in *Robbins* "provide[d] no suggestion as to what the grounds for an equal protection violation might be." *Id.* at 1252-53. The same cannot be said here, where petitioners have understood from the inception of the lawsuit the grounds for the equal protection violation alleged by respondent.

CONCLUSION

For the foregoing reasons, the Court should dismiss the petition for want of appellate jurisdiction or, in the alternative, affirm the decision below.

Respectfully submitted,

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